STATE OF NEW YORK
ROCHESTER CITY COURT
CIVIL BRANCH
89 NOV 13 PM 4:44
FILED
CLERK
'89 NOV 13 PM 4:33
RECEIVED
DISTRICT ATTORNEY

STATE OF NEW YORKCOUNTY OF MONROE
ROCHESTER CITY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-vs-

NINA LEIBOWITZ, KATHLEEN RILEY,
SARAH WELLS, SUSAN DAVID, MARILYN HILLER,
GAIL NIESNER, RAMONA SANTORELLI, LYN GALLO,

Defendants.

MEMORANDUM OF LAW TO DISMISS THE INFORMATIONS

EDWARD J. NOWAK
Monroe County Public Defender
Attorney for Defender
BY: JEFFREY WICKS
Assistant Public Defender
Of Counsel
10 N. Fitzhugh Street
Rochester, New York 14614
(716) 428-5210

SHARON KELLY SAYERS
Attorney for Defendants
RILEY, WELLS, DAVID, MILLER,
NIESNER, SANTORELLI AND GALLO
30 W. Broad Street
Rochester, New York 14614
(716) 454-2320

TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

POINT I: SECTION 245.01 PROHIBITING WOMEN FROM APPEARING TOPLESS IN PUBLIC BUT NOT MEN, VIOLATES EQUAL PROTECTION UNDER THE NEW YORK STATE AND FEDERAL CONSTITUTIONAL GUARANTEES, AND THEREFORE, IS UNCONSTITUTIONAL ON IS FACE. 7

A. Introduction. 7

B. The Gender-Based Discrimination Set Forth In The Statute Fails To Substantially Relate To An Important Government Interest. 8

1. Introduction. 8

2. Penal Law §245.01 Does Not Reflect Community Standards. 8

3. There Is Absolutely No Evidence For The Assertion That Penal Law §245.01 Prevents Either Indecent Conduct, Public Disturbance Or Inconvenience. 10

C. The Gender-Based Discrimination Inherent In Penal Law §245.01 Actually Serves To Harm Women. 12

POINT II: THE LEGISLATIVE HISTORY OF PENAL LAW §245.01 SUGGESTS THAT NO GENDER-BASED DISCRIMINATION WAS INTENDED FOR THE ENTIRE POPULATION. 14

A. Enactment Of Former Penal Law §245.01 Exposure Of Female. 14

TABLE OF CONTENTS

(Cont.)

PAGE

B. Repeal Of Former Penal Law §245.01 Exposure Of A Female. 14

C. Amendment To New Penal Law §245.01 Exposure Of A Female. 15

POINT III: AN EXAMINATION OF SIMILAR LAWS IN OTHER STATES MAKES IT CLEAR THAT NEW YORK'S EXPOSURE OF A PERSON STATUTE IS VIRTUALLY ALONE IN ITS GENDER-BASED DISCRIMINATION. 16

POINT IV: REMEDY

CONCLUSION 22

PRELIMINARY STATEMENT

This is a Memorandum of Law in support of the defendants' motion to dismiss the informations charging them with violating New York Penal Law §245.01 (Exposure of a Person). The Memorandum provides support for the challenge to the statute made by the defendants at the conclusion of their trial. That challenge asserts that the aforementioned statute is violative of the Equal Protection guarantees of both the New York and Federal Constitutions, and accordingly, that the statute is unconstitutional on its face.

The defendants were charged on June 24, 1989 with Exposure of a Person, allegedly in violation of P.L. §245.01, following an incident at the beach in Durand Eastman Park in the City of Rochester, New York. They were arraigned in the Rochester City Court before the Honorable John Manning Regan on June 27 and June 28, 1989. At their court appearance on August 1, 1989, the Monroe County Public Defender, Jeffrey Wicks, of counsel, was appointed to represent Nina Leibowitz. Also at that time, Attorney Sharon Kelly Sayers appeared for the defendants Tierney O'Brien-Dovan, Kathleen Riley, Sarah Wells, Susan David, Marilyn Hiller, Gail Niesner, Ramona Santorelli and Lyn Gallo. Finally, defendant Mary Lou Schloss appeared pro se.

A non-jury trial in this matter commenced before Judge Regan on September 26, 1989, and continued on September 27, September 28 and October 2, 1989. When all the proofs were closed, Judge Regan dismissed the charges against Ms. O'Brien-Dovan based on P.L. §245.01's exception regarding breastfeeding. Also, at that time the defendants' moved to dismiss the informations based on their contentions that the

statute is unconstitutional, as described supra.

STATEMENT OF FACTS

June 24, 1989 was, by all accounts, a beautiful, hot and sunny day in Rochester, New York. When a picnic was planned at the beach area of Durand Eastman Park by dozens of men and women, including Nina Leibowitz, Kathleen Riley, Sarah Wells, Susan David, Marilyn Hiller, Gail Niesner, Ramona Santorelli, Lyn Gallo, Mary Lou Schloss and Tierney O'Brien-Dovan, no one expected anything except a normal day at the beach. What happened that day was beyond the expectations of anyone.

Six Monroe County Sheriff's Deputies testified at the trial. According to their testimony, Deputies Zink and Terhaar received a broadcast at 12:45 p.m. on June 24, 1989 while patrolling on a Sheriff's boat on Lake Ontario. The only content of the bulletin was that there were "a hundred people naked" on the beach at Durand, and that there was "going to be trouble." Zink and Terhaar both testified that they were unaware of where the broadcast had originated. They also were unaware of any complaints regarding "topfree" women.

Zink and Terhaar admitted that when they arrived on the beach, there was neither a hundred naked people nor any trouble. Instead, what they saw was a normal picnic at the beach, except that approximately twenty-five to thirty women were without clothing on their upper bodies.

Upon their arrival, Zink and Terhaar asked that the "topfree" women cover themselves. Most of the women complied, except for the ten eventual defendants. Upon their refusal, other deputies were summoned so that the women refusing to cover themselves could be arrested.

Deputies Roland, Campanella, Scorsone and Gudonis responded to the deputies' dispatch. Roland and Campanella were the first to arrive at Durand. Before actually setting foot on the beach, they were greeted by a "family" which was purportedly upset by the presence of topfree women on the beach. However, it is clear that this was the only complaint of any kind regarding the defendants that any police agency received that day.

All six deputies testified that the activities apparent to them on the beach at Durand Park on June 24, 1989 represented a normal picnic day at the beach. Each one stated that there were men, women and children among the participants, and that the activities consisted of eating, playing sports and games, enjoying the sun and swimming. Every deputy testified that despite the fact that many men were topfree, not one man was arrested.

Significantly, not one deputy testified that there was any disturbance of any kind associated with the picnic at Durand on June 24, 1989. No deputy could describe any problem that could be remotely attributed to the activities of the defendants. In fact, when asked if any crowds gathered on the beach that day, Deputy Campanella replied that there were no crowds until the police arrived.

Every defendant testified in her behalf. Nina Leibowitz first testified that on June 24, 1989, she participated in a picnic with seventy or so men, women and children at Durand beach. It was an exceptionally warm day, so she removed her top. During the time that she was topfree, she received no complaints from anyone. At the moment of her arrest, she was simply eating her lunch.

Ramona Santorelli testified that she has had many prior public topfree experiences since 1985, but has failed to receive any complaints. Her prior topfree experiences included not only being in parks and beaches, but crowded urban areas.

Each of the remaining defendants represented by Ms. Sayers similarly testified that they removed their tops on June 24, 1989 in furtherance of their enjoyment of the day and because it was hot. Further, each defendant testified that her prior public topfree experiences, both in the Monroe County area and around the country, had failed to yield any complaints at all.

The next to testify was Jeff Ulrich, the program manager at WROC-TV in Rochester. Mr. Ulrich testified that approximately 25,000 people view the 6:00 p.m. evening news on WROC-TV. He testified that on June 24, 1989, he made the decision to air footage of the scene that day at Durand Park, which included the bare breasts of several of the defendants. However, his station failed to receive even one complaint regarding the footage.

Pro se defendant Mary Lou Schloss testified as to her many public topfree experiences prior to 1989, all of which had failed to yield any complaints. Similarly, she testified that she was unaware of any complaints about the topfree activities on June 24, 1989.

The last to testify for the defendants' case was psychologist and author Dr. Rita Friedman. Dr. Friedman testified that women's breasts were "secondary sexual organs", i.e., organs for which eroticism is purely a social phenomenon. She stated that there are many similarities between men's and women's breasts, and it is only the cultural differences between the sexes that leads men's and women's breasts to be

viewed differently. She noted that our society has a "cultural obsession with breasts" that is, unfortunately, even shared by women. As a result, it was her opinion that many women experience a "negative body image."

Dr. Friedman testified that covering breasts and other parts of the body can produce harmful results. Historically, women's hands and legs were covered until recently. In contrast, in some societies, women do not cover their breasts at all. She said that the impact of covering breasts is two fold: first, it keeps us from knowing what women's breasts really look like, and thus fosters an abnormal image of them; and second, to keep women's breasts covered when men's breasts are not covered could further maintain this abnormal image. Finally, Dr. Friedman testified that it was her opinion that New York's Exposure of a Person statute actually harms women because it gives credence to the notion not only that women's breasts are different but that there is an abnormal mystique about them.

After proofs were closed, the court dismissed the charge against Ms. O'Brien-Dovan. Subsequently, the defendants moved to dismiss the informations, arguing that P.L. §245.01, the statute under which they were prosecuted, was unconstitutional as violative of equal protection. Additionally, they argued that the government held the burden of proof to show that an important government interest existed to justify the gender based discrimination. The government opposed the motion. This Court then granted an adjournment so that briefs may be filed.

POINT I: SECTION 245.01 PROHIBITING WOMEN FROM APPEARING TOPLESS IN PUBLIC BUT NOT MEN, VIOLATES EQUAL PROTECTION UNDER THE NEW YORK STATE AND FEDERAL CONSTITUTIONAL GUARANTEES, AND THEREFORE, IS UNCONSTITUTIONAL ON IS FACE.

A. Introduction.

The defendants in this case are charged with violating 245.01 of the New York State Penal Law:

> A person is guilty of exposure if he appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private or intimate parts of a female person shall include that portion of the breast which is below the top of the areola. This section shall not apply to the breast-feeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.

The statute which the defendants are accused of violating is unconstitutional and otherwise invalid in that it violates the equal protection clause of the Federal Constitution (U.S. Const., 14th Amend.) and the New York State Constitution (N.Y. Const., Article I, 11). Specifically, the statute violates equal protection because it burdens only women and not men from exposing their breasts in public.

The Court of Appeals has repeatedly recognized and adopted the holdings of the United States Supreme Court that "a statute which treats males and females differently violates equal protection unless the classification is substantially related to the achievement of an important governmental objective." People v. Liberta, 65 N.Y.2d 152 (1984), citing Caban v. Mohammed, 441 U.S. 380 (1979); Craig v. Boren, 429 U.S. 190 (1976); People v. Whidden, 51 N.Y.2d 457, app. dism. 454 U.S. 803 (1980) (emphasis added). This test applies for every gender-based classification

whether the statute discriminates against males or against females. Liberta at 168. The government bears the burden of showing both the existence of an important governmental objective and the substantial relationship between the discrimination in the gender-based classification of the statute and that objective. Liberta at 168; Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).

B. The Gender-Based Discrimination Set Forth In The Statute Fails To Substantially Relate To An Important Government Interest.

1. Introduction.

In the seminal case of People v. Liberta, the Court of Appeals was confronted with an equal protection challenge to New York State's rape statute (P.L. §130.35) which burdened only males who forcibly rape females but not females who forcibly rape males. Ibid. at 67. Utilizing the established constitutional test, that Court reasoned, in order to meet the burden of showing the gender-based law was substantially related to an important governmental objective, the People were required to set forth an "exceedingly persuasive justification" for the discriminatory classification. Ibid. at 170; citing Mississippi Univ. of Women v. Hogan, 458 U.S. 718, 7234 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981). In order to meet this burden, the anticipated justification to be advanced by the government for §245.01 is that the statute merely reflects the current standards of the community in defining private or intimate parts of a female person. Additionally, it is anticipated that the government will claim that the classification is justified because such discrimination prevents the possibility of indecent conduct and avoid public disturbance and inconvenience. The task before this Court is to determine whether

the justification advanced by the Government can survive the test established by the United States Supreme Court and the courts of this State. The defendants contend this burden is not met in the present case, and therefore the gender-based discriminatory classification renders this statute unconstitutional.

2. Penal Law §245.01 Does Not Reflect Community Standards.

It is anticipated that the Government will advance the theory that the statutes reflects the will of the community, as expressed in legislative enactment, to define and proscribe the exposure of "private" or "intimate" parts of the female body. The issue is identical to that presented in People v. Onofre, 51 N.Y.2d 476, 488, n. 3 (1980). In a challenge to a New York State statute which prohibited consensual sodomy that Court reasoned: "[T]he community and its members are entirely free to employ theological teaching, moral suasion, parental advise, psychological and psychiatric counseling and other noncoercive means to condemn the practice of consensual sodomy." The narrow question before us is whether the Federal State Constitutions permit the use of the criminal law for that purpose. That Court concluded it is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or apparatus for the intended enforcement of moral or theological views.

The evidence presented by both sides in the trial in the case at bar overwhelmingly contravenes any assertion by the Government that Penal Law §245.01 reflects community standards. The only complaint regarding the defendants' activities to which any witness testified was after the officers arrived at the scene. Other than

this one "family" which was purportedly upset by the presence of "topfree" women on the beach, there was no evidence of any complaints. Furthermore, each defendant testified that she had experienced being "topfree" on many prior occasions in public, none of which had yielded any complaints. Finally, it is significant that out of a viewing audience of 25,000 people, not one complaint was reported when WROC-TV program manager Jeff Ulrich decided to air pictures of the bare-breasted defendants. Consequently, it is obvious that the lack of complaints, not only on June 24, 1989 but prior to that date, means that alleged "community standards" no longer exist (to the extent that they ever existed) to define and proscribe the exposure of the top of a woman's body. Because the government has utterly failed to assert any evidence to the contrary, any contention that "community standards" are reflected in the statute must fail.

3. There Is Absolutely No Evidence For The Assertion That Penal Law §245.01 prevents Either Indecent Conduct, Public Disturbance Or Inconvenience.

In the case at bar, the government presented six police officers. Upon cross-examination, each officer was asked if any disturbance of any sort was caused by the activities of the defendants at Durand beach on June 24, 1989. Not one officer was able to testify that any disturbance or problem was caused by the "topfree" activities by the defendants. Moreover, when one officer was asked if any crowds gathered due to the defendants' activities, he replied that no crowds gathered until the police got there. Consequently it is obvious that any anticipated argument by the government that the gender-based discrimination inherent in the statute in question is justified to prevent such conduct must fail.

Any assertion that Penal Law §245.01 is designed to prevent "the possibility of indecent conduct and avoid public disturbance and inconvenience" is absurd absent sufficient reliable evidence to justify such bold faced allegations. Can the sight of a bare-breasted female in a public place insight such torment that the imposition of criminal sanctions is necessary to prevent such conduct? Such "romantic paternalism" is typical of the traditional rationalization used to justify discrimination, which in practical effect, puts women, not on a pedestal, but in a cage. Frontiero v. Richardson, 411 U.S. 677 (1973). Our Nation has had a long and unfortunate history of sexual discrimination. The sole basis of the classification established in the challenged statute is the sex of the individual, which burdens females but not males for appearing bare-breasted in public. Justice Brennan in Frontiero noted that this paternalistic attitude was and still is firmly rooted in our national consciousness.

> As a result of notions such as these, our text statute books became latent with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the nineteenth century the position of women in our society was, in many respects, comparable to that of Blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries or bring suit in their own names and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although Blacks were guaranteed the right to vote in 1870, women were denied even that right in 1870, women were denied even that right -- which is itself "preservation of other basic civil and political rights" -- until adopted of the Nineteenth Amendment half a century later.
>
> It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sexual characteristic, women still face pervasive, although at times more subtle, discrimination in

> our education institutions, in the job market and perhaps most conspicuously in the political arena.

Frontiero v. Richardson, 411 U.S. 677 (1973).

Finally, the Government's assertion that §245.01 prevents the possibility of indecent conduct and avoids public disturbance or inconvenience necessarily implies that the conduct proscribed be offensive. However, the statute however is devoid of any requirement that the conduct proscribed by the statute be in any way offensive or annoying to other citizens, and therefore the challenged statute cannot be characterized as a harassment statute justifying the criminal sanctions. People v. Uplinger, 58 N.Y.2d 936 (1983).

C. The Gender-Based Discrimination Inherent In Penal Law §245.01 Actually Serves To Harm Women.

The Court of Appeals in People v. Liberta, 64 N.Y.2d 152 (1984), recognized that in order for the Government to meet their burden of proof in the substantial relationship test it is required, among other things, to show that the gender-based law serves the governmental objective better than would a gender-neutral law. In that case the Court held "a gender-neutral law sanctioning forcible rape would indisputably better serve, even if only marginally, the objective of deterring and punishing forcible sexual assault." Quoting the Supreme Court the Court reasoned, "[a] gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny." Liberta, 64 N.Y.2d at 170.

In the case at bar, far from serving the governmental objective better than a gender-neutral law, the uncontroverted evidence demonstrates that Penal Law §245.01

actually harms women. It was the testimony of Dr. Rita Friedman, a well-known psychologist and author, that statutes such as the one in question actually serves to harm women. Dr. Friedman stated that a law which mandates that women's breasts be covered while failing to require that men's breasts be covered serves only to give credence to archaic notions about the differences between the sexes. Such notions are not based in fact, given that the "eroticism" connected with breasts are only of a cultural, social nature and not of a biological nature. See Saint v. Nebraska School Activities Association, 684 F.Supp. 626, 629 (D. Neb., 1988), quoting form Force by Force v. Pierce City, R-VI School District, 570 F.Supp. 1020, 1029 (W.D. Mo., 1983):

> Such a paternalistic gender-based classification, that is, one resulting from ascribing a particular trait or quality to one sex, when not all share inherently unfair but generally tends only to perpetuate stereotypical notions regarding the proper rules of men and women.

Dr. Friedman testified that the "cultural obsession with breasts", among other things, has led many women to become dissatisfied with their bodies, a condition with in turn can lead to such diseases as anorexia and bulimia. Furthermore, any statutes which codifies the prohibition against the exposure of women's breasts can only serve to perpetuate this unnatural fascination with female breasts. This, in turn, heightens the above-described potential for harm to women. Therefore, the statute is unconstitutional since its gender-based discrimination not only fails to serve any important governmental interest but actually contravenes an important government interest.

POINT II: THE LEGISLATIVE HISTORY OF PENAL LAW §245.01 SUGGESTS THAT NO GENDER-BASED DISCRIMINATION WAS INTENDED FOR THE ENTIRE POPULATION.

A. Enactment Of Former Penal Law §245.01 Exposure Of Female.

Former Penal Law §245.01 was enacted in 1967 in response a regional concern in the City of New York that restaurants with topless waitresses were becoming too widespread. The supporting memorandum for the bill is entitled "Topless Waitresses."[1] The text for the former section was authored by the Corporation Counsel for the City of New York "in an effort to curb the topless waitress fad in the City of New York."[2] At the same time, the legislature enacted Penal Law §245.02 prohibiting Promoting the exposure of a female, so that the restauranteur, "the producer of such an appearance is likewise guilty".[3] Former Penal Law §245.01 exposure of a female was subsequently amended in 1970 to correct the spelling of "areola".

B. Repeal Of Former Penal Law §245.01 Exposure Of A Female.

In 1983, the New York State Legislature passed a bill which repealed former Penal Law §245.02 exposure of a female and enacted in its place the presently existing §245.01 exposure of a person. As applied, former §245.01 made it "perfectly legal for a man and woman to be bottomless anywhere in public. The woman would

---

[1] New York State Legislative Annual-1967, page 22.

[2] Ibid.

[3] Ibid.

only be violating state law if she was topless as well."[4] As written, police were reluctant to enforce the law because as between a bottomless and topless man and woman - only the woman could be arrested under the then existing law, which "brings up some constitutional as well as sex discrimination problems."[5]

Therefore, the repeal of §245.02 and its replacement with §245.01 was an effort to make the statute gender neutral. The sponsors removed a designated sex from the title of the statute, and amended the text to include bottomless men as coming under the statute.[6] The thrust of the section remained unchanged in that the female but not the male was still prohibited from exposing the top portion of her torso unless she was "entertaining or performing in a play, exhibition, show or entertainment."

C. Amendment To New Penal Law §245.01 Exposure Of A Female.

In 1984, presently existing Penal Law §245.01 exposure of a person was amended to include breast feeding of infants as an exception to the statute without explanation or comment as the reason therefore.

---

[4] New York State Legislative Annual-1983, page 101.

[5] Ibid.

[6] Ibid.

POINT III: AN EXAMINATION OF SIMILAR LAWS IN OTHER STATES MAKES IT CLEAR THAT NEW YORK'S EXPOSURE OF A PERSON STATUTE IS VIRTUALLY ALONE IN ITS GENDER-BASED DISCRIMINATION.

In addition to New York, forty-five other states have statutes regulating public decency.[7] Of the forty-five, two states, North Carolina and Indiana, have statutes similar to New York in that they proscribe exposure of female breasts irrespective of whether the exposure is accompanied by any lewd conduct. Six other states prohibit exposure of female breasts when accompanied by lewd conduct, and the remaining thirty-seven states do not specifically proscribe exposure of the female breasts at all. In fact Alaska, Idaho and Rhode Island have no statutes regulating exposure of a person.

The six states which specifically proscribe the exposure of female breasts differ from the New York statute in that there is an apparent mens rea requirement, to wit, exposure must be accompanied by lewd conduct. In these states the simple exposure of female breasts is not proscribed as criminal. For example, §14:106 of the Louisiana Code provides that exposure of female breasts is an offense when accompanied with an intent to arouse sexual desire. In Delaware, §764 of the Penal

---

[7] Four states are not included in the comparative study. They are: New Jersey, New Mexico, Oregon and Pennsylvania. At the time the comparative study was conducted, the relevant volumes for those states were not available.

Law requires knowledge that such conduct is likely to cause affront or alarm. Arizona, Arkansas, Mississippi and Wyoming have similar statutes.[8]

In the thirty-seven remaining states, exposure of female breasts is not illegal. Through various statutory definitions and appellate court decisions, the thirty seven states which regulate public lewdness have seen fit to exclude exposure of female breasts from the scope of criminally lewd conduct.

The court decisions and statutory commentary in four states, Alabama, California, Hawaii and Texas, state that exposure of female breasts is not an offense. In California, the court held the "display of bare female bosom, whether defined as 'entertainment' or not, does not violate state law." Robins v. Los Angeles County, 56 Cal. Rptr. 853 (1966).

Texas does not include female breasts in §21.08 of the code:

> §21.08 does not proscribe exposure of the buttocks or female breast, two areas of anatomy not traditionally included in the term genitals, because to do so would criminalize half those present at any time at a public swimming pool." §21.08, Texas penal code, Practice Commentary: 1973.

An Alabama appellate court held that a local ordinance prohibiting exposure of women's breasts in establishments was reasonably restrictive as it enlarges the scope of the state statute which only restricted bottomless dress. Smith v. City of Huntsville, 515 So. 72 (Ala. Crim. 1986).[9]

---

[8] Arizona, Penal Law §13-1402; Arkansas, Penal Law §5-68-204; Delaware, Penal Law §764; Mississippi, Penal Law §195-5-103; Wyoming, Penal Law §6-4-20.

[9] See also, Hawaii, Penal Code §712-1217.

Even the thirteen states that proscribe exposure of genitalia, only make such exposure criminal where there is additional intent or conduct. Colorado requires the exposure occur under circumstances likely to cause affront or alarm.[10] For exposure to be an offense in Montana, the violator must have an underlying purpose to arouse or gratify sexual desire.[11] A person must lewdly expose his/her genitals under circumstance which may be offensive to a viewer in Oklahoma.[12] Similar statutes can be found in the penal codes of Iowa, Kentucky, Maine, Missouri, Montana, Nebraska, New Hampshire, North Dakota, South Dakota, Tennessee, and Utah.[13]

In four states, Florida, Kansas, West Virginia and Wisconsin, exposure of one's sex organ is prohibited, with no cases categorizing breasts as sex organs. All three states require additional behavior or intent to make such exposure criminal. In Kansas, there must be "intent to arouse or gratify the sexual desires of the offender or of another", thus keeping the statute's application narrow and specific.[14]

---

[10] Colorado Penal Law §413.

[11] Montana, Penal Law §45-5-504.

[12] Oklahoma, Penal Law, 21 §1021.

[13] Iowa, §709.9; Kentucky, §510.150; Maine, 17A §854; Missouri, §566.130; Montana, §45-5-504; Nebraska, §28.806; New Hampshire, §645.1; North Dakota, §12.1-20-12.1; South Dakota, §22-24-1; Tennessee, §39-13-511; and Utah, §76-9-702.

[14] State vs. Perrigio, 708 P.2d. 987 (1985); Kansas Penal Code §21-3508. See also, Florida, §803.03; West Virginia, §61-8B-10; and Wisconsin, §944.20.

The remaining states use undefined terms such as "private parts,"[15] and "exposure of his person"[16] undefined "lewd and lascivious conduct" is prohibited in Vermont,[17] and undefined "indecent exposure" is proscribed in Maryland.[18] These four states and the remaining ten do not recognize mere exposure as an offense. All fourteen require some additional conduct or intent accompanying the exposure. For example, Illinois prohibits "lewd" exposure,[19] as does Minnesota;[20] and Massachusetts and Michigan proscribe "obscene" exposure.[21]

In the United States, at least forty-six of the fifty states have enacted statutes regulating lewd public exposure. New York stands alone with North Carolina and Indiana in its policy which regards mere exposure of female breasts as offensive and violative of public decency. Six of the remaining forty-three states do not find mere exposure of female breasts constitutes an offense; they all require some accompanying lewd conduct intended to arouse or gratify sexual desire, or at minimum, conduct intended to cause affront or alarm.

---

[15] Ohio, Penal Law §2907.09.

[16] Washington, Penal Law §9A.88.010.

[17] Vermont, Penal Law §2601.

[18] Maryland, Penal Law 27 §335A.

[19] Illinois, Penal Law 38 ¶11-8.

[20] Minnesota, Penal Law §617.23.

[21] Massachusetts, Penal Law C272 §53; Michigan, Penal Law §28.567(1). See also, Connecticut, penal §53a-186; Georgia, Penal Law §16-6-8; Nevada, Penal Law §201.220; South Carolina, Penal Law §16-15-30; and Virginia, Penal Law §18.2-387.

A majority of the remaining thirty-seven states specifically omit exposure of female breasts without attendant lewd behavior from the scope of indecent exposure, as demonstrated by appellate court holdings, practice commentary and by the specific terms within the statutes themselves. These states do not qualify such exposure to circumstances free of lewd or obscene conduct or intent, they exclude female breasts entirely.

State legislatures have enacted statutes which provide that men and women who wish to go bottomless in public, are subject to statutory restrictions. With respect to males and females going topless or topfree, forty-three states statutorily permit females to go topfree. The only restriction on females, and only in six states, is that if the female's conduct is lewd or obscene, topfree conduct is proscribed.

New York State is within the small minority of American states which makes mere exposure of female breasts a punishable offense.

POINT IV: REMEDY.

Having found that Penal Law 245.01 is an unconstitutional violation of equal protection, the remaining issue is the appropriate remedy for these equal protection violations. When a statute is constitutionally defective for violating equal protection, a court may either strike the statute, and thus make it applicable to no one or, extend the coverage of the statute to those formally excluded. People v. Liberta, 64 N.Y.2d 152, 170 (1984). This Court's task is to discern what course the Legislature would have chosen to follow if it had foreseen the court's ruling. Extending the coverage of this statute to those males who were formally excluded from criminal liability is both impractical and inappropriate. The only feasible and recommended remedy is that the statute should not be applied to any person male or female who appears bare-breasted in public in a non-commercial and certainly not lude manner.

CONCLUSION

WHEREFORE, THE DEFENDANTS RESPECTFULLY REQUEST, BASED ON ALL THE FOREGOING, THAT THIS COURT FIND THEM NOT GUILTY SINCE THE STATUTE UNDER WHICH THEY ARE PROSECUTED IS UNCONSTITUTIONAL.

DATED: November 13, 1989

Respectfully submitted,

EDWARD J. NOWAK
Monroe County Public Defender
Attorney for Defender
BY: JEFFREY WICKS
Assistant Public Defender
Of Counsel
10 N. Fitzhugh Street
Rochester, New York 14614
(716) 428-5210

SHARON KELLY SAYERS
Attorney for Defendants
RILEY, WELLS, DAVID, MILLER, NIESNER, SANTORELLI AND GALLO
30 W. Broad Street
Rochester, New York 14614
(716) 454-2320

radio messages to Sheriff's patrol cars assigned to the park, alerting them to the situation, and requesting their assistance.

When Zink arrived at the scene where the defendants were, he saw about 25 to 30 women naked from above the waist. Because he was aware that New York's penal laws forbade public exposure of a female person's breasts below the top of the areola,[1] he admonished all the women to cover their breasts. Many of the women complied. These defendants did not comply. Zink repeated his orders several times, but these defendants disobeyed him. As these events were in progress, the patrol cars Zink had summoned, arrived. Unable by any method to convince any of these defendants that they should cover their breasts, Zink authorized their arrests for violation of Penal Law §245.01.

Accordingly, the defendants were arrested, put in a transport van, and taken downtown to police headquarters for identification, fingerprinting, and booking on that charge. After an hour or so, they were released with appearance tickets for arraignment on Tuesday, June 27th, in Court.

---

[1]See Penal Law §245.01 which reads as follows: "A person is guilty of exposure if he appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private or intimate parts of a female person shall include that portion of the breast which is below the top of the areola. This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment. Exposure of a person is a violation. Nothing in this section shall prevent the adoption by a city, town or village of a local law prohibiting exposure of a person as herein defined in a public place, at any time, whether or not such person is entertaining or performing in a play, exhibition, show or entertainment."
This law applies only to public nudity. Nudity in circumstances where there is a reasonable expectation of privacy is not within the scope of the statute.

On June 27th, all the defendants pleaded not guilty. After preliminary matters were completed, the Court scheduled this trial for September 26th. The trial concluded on October 2, 1989.

* * *

The trial did not produce any controversy over questions of fact. The defendants, as well as the witnesses for the prosecution, testified similarly. All the witnesses agreed that, at the public park on that day in June, all of these defendants had deliberately exposed their breasts, and when they were advised to cover them, they had refused to do so.

What did develop at the trial was a concerted effort to persuade this Court that Penal Law §245.01 is an unconstitutional attempt to deprive these defendants of equal protection of the law. The defendants have argued that exposure of the breast is a penal violation only for women, not for men. They have urged that this gender classification is discriminatory and unjustified. They have produced experts in psychology, and other social sciences, to show that this law rests on sexual stereotypes, not on scientific findings, and that it has no rational basis. Moreover, through other social science data, they have striven to show that the law is actually harmful to women and fails to achieve any important governmental objective.

* * *

These defendants are sincere in their legal arguments. They have consciously narrowed the evidence and this Court's focus, to such an extent that the sole question for decision in this case is whether this penal statute violates the guaranty of equal protection of the law, which the Constitution grants to all persons. That was the only motion the defendants made at the close of the proofs, - to dismiss the charges on these constitutional grounds.

DECISION & VERDICT

For the reasons which follow, this court denies the motion to dismiss these charges on the ground that the penal statute prohibiting women from publicly exposing their breasts is an unconstitutional deprivation of equal protection of the law. Moreover, upon all the credible evidence, the Court finds each defendant guilty of violating §245.01 of the Penal Law of New York.

OPINION

This Court agrees with the defendants that this statute discriminates on a purely sexual basis. It commands women to cover their breasts in public. It issues no similar command to men.

However, under the law, such sexual discriminations do not constitute a denial of equal protection of the law so long as the discrimination is "substantially related to the achievement of an important governmental objective." See Mississippi Univ v. Hogan, 458 U.S. 718 (1982); People v. Liberta, 64 NY2d 152 (1984); People v. Craft, 134 Misc 2d 121 (1986).

The question then is whether the law banning public exposure of a woman's breasts is substantially related to the achievement of an important governmental objective. Since this Court has concluded that it is so related, no constitutional deprivation exists.

a. History of the Statute

(The life of the law is not logic, but history)

In 1967, in order to counter the proliferation of topless waitresses in the bars and taverns of New York City, the Legislature enacted a proposed bill from the office of the Corporation Counsel of the City of New York which prohibited women from appearing in public places nude from above the waist. This original law was entitled: "Exposure of a Female", and modified what was then Sec. 1140 of the Penal Law and Sec. 245 of the Revised Penal Law.[2]

The impetus behind passage of this bill was to prevent public indecency.[3]

---

[2]See Laws, 1967, c. 367.

[3]See Legislative Report, N.Y. State Bar Assn., Report #170, dated 18 April 1967, from Bill Jacket No. S. 1226-B.

It exempted women who exposed their breasts while performing in a theatrical setting. It also punished anyone who promoted such public exposure of females - thereby targeting the bar and tavern owners themselves.

In 1983, the Legislature considered, and passed, a totally revised version of the indecent exposure laws. Insofar as possible, it made the statute gender-neutral, i.e. applicable to both men and women, and banned public nudity by persons of either sex. But the new statute retained the sexually based discrimination in respect to breasts, and continued, in the very same language, to forbid only women from exposing their breasts in public.[4]

These revisions of 1983 are the current law, except for the additional exemption of 1984, which exonerated women engaged in the breast-feeding of infants.[5]

The 1983 revisions, however, were even more parochial in origins than the topless waitress fad of 1967. As the legislative history demonstrates, the new statute sought to correct a situation which had developed at Jacob Riis Beach in Queens in which nude bathers, both male and female, had so monopolized the beach area as to exclude the residents of the local community. As Governor Cuomo stated when he approved the law:

> "I am aware that there are parents and children who use public beaches as their major summer recreational experience. This law will protect them from the discomforts caused by unwelcome public nudity."[6]

---

[4]See Laws, 1983 c. 216.

[5]See Laws, 1984 c. 633.

[6]Message of the Governor, dtd June 2, 1983, upon approving the bill. See Session Laws, 1983, c. 216, at p. 2756.

* * *

What is distilled from this legislative history are four indisputable points:

1. The law proscribes public nudity as such, regardless of any ulterior state of mind, or lewdness of purpose.

2. The law defines nudity as the exposure of the private and intimate parts of the human body, and declares the breasts of a female, but not of a male, as a private or intimate part of the human body.

3. The law penalizes nudity, not a manner of dress nor a form of personal appearance.

4. The purpose of the law is to protect public decency, and to prohibit public indecency.

b. The Achievement of Public Decency is an Important Governmental Objective

In Webster's encyclopedia dictionary the word, decency, is defined as a state or quality which gains general approval. It is attributable to dress, behavior, speech, ritual, and all other forms of human conduct.[7]

Since it is a fundamental objective of the criminal law to establish a minimum standard of decent behavior, criminal statutes which decide what conduct society shall not tolerate necessarily attempt to determine what human behavior

---

[7] See Webster, Encyclopedic Dictionary, edition of 1971, at p. 220.

will, and what will not, gain general public approval or disapproval, as the case may be. The task is not always easy.

In this case, the Legislature has decided that public exposure of the female breast - absent certain exceptions - is behavior which will not attain general approval, and which the general public will overwhelmingly disapprove for the foreseeable future.

The defendants argue that the Legislature is wrong, and that exposure of the female breast is both decent and wholesome.

One short answer to this argument is that the defendants should take the matter up with the Legislature, not the Courts.

A more appropriate answer - in view of the obvious good faith of these defendants - is that coping with public nudity, and fixing a point of limitation on it, is essential to maintaining public morality and decency. And establishing public morality and decency is critical to the sense of identity and self-worth of any society, because those virtues promote order, self-discipline, and tranquility. That is what makes public decency an important governmental concern.

There is no question that - historically at least - the United States is a society which accepts Judeo-Christian teachings. While we are pluralistic in composition, the great majority of our people observe Judeo-Christian moral standards. If lawmakers refer to those standards for guidance in enacting laws to achieve public morality, therefore, they will, more likely than not, accomplish their purpose.

Nudity and morality are inextricably interwoven in the Judeo-Christian ethic. The first book of the Bible - GENESIS - uses nudity, and man's consciousness of it, to illustrate how mankind acquired the knowledge of good and evil.

> "So she took some of its fruit and ate it; and she also gave some to her husband, who was with her, and he ate it.
>
> 7. Then the eyes of both of them were opened, and they realized that they were naked, so they sewed fig leaves together and made loin cloths for themselves.
>
> 8. When they heard the sound of the Lord God moving about in the garden at the breezy time of the day, the man and his wife hid themselves from the Lord God among the trees of the garden.
>
> 9. The Lord God then called to the man and asked him 'Where are you?'
>
> 10. He answered; I heard you in the garden but I was afraid, because I was naked, so I hid myself.
>
> 11. Then the Lord God asked: 'Who told you that you were naked?' You have eaten then from the tree (of the knowledge of good and evil) of which I had forbidden you to eat!"
> GENISIS, c.3 v. 6-11.

Nudity, accordingly, in the Judeo-Christian ethic, is a catalyst for shame, and for immoral behavior. It triggers a compelling and immediate choice between good and evil for anyone who possesses the knowledge of good and evil. Judeo-Christian morality bans public nudity therefore to reduce the incidence of that choice and, correspondingly, to reduce the incidence of public misbehavior.

GENESIS, and its allegorical moral teachings, have permeated the collective moral conscience of our civilization for thousands of years. Those moral principles

have gained acceptance among the vast majority of western peoples, including those living in the United States. By contrast, this nation is barely 200 years old, and the State Legislature, as we know it, a little more than 150 years old. What our Legislature has done, then, is to pass a law about public nudity which reflects the moral standards of public decency already prevalent in the society. In doing so, the Legislature contributes to the preservation of peace and order (which is one of the primary goals of police power statutes) by reducing the incidence of circumstances likely to create public disorder.[8]

c. The Constitution Does Not Grant to Any Individual a Right to Public Nudity

Since Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965), fundamental rights of privacy and liberty which individuals have claimed to "emanate" from the Constituion have expanded significantly. In 1986, Robert Hallman, who had appeared nude on Jacob Riis Beach in Queens, and who had been convicted of a violation of the present indecent exposure law (P.L. §245.01), tried to persuade the New York Court of Appeals that he held a fundamental constitutional right to appear nude in public. Hallman's arguments to that Court at that time are virtually

---

[8] In People v. Price, 33 N.Y. 2d 831 (1973) the Court of Appeals recognized the legitimacy of legislation regulating the manner of dress whenever it created circumstances risking public disorder.

identical to the defendants' argument to this Court now: to wit, that nudism promotes physical and psychological health, heightened awareness of human potentials, and freedom from the repressions of Puritanism and the constraints of clothing.

The Court of Appeals decided then, and accordingly, this Court must decide now, that no such fundamental right exists; that public nudity is not an essential ingredient of constitutional liberty, and that, far from promoting and preserving the public order, it frequently causes a breach of the public peace, because it violates the predominant sense of moral decency which our society has already accepted.[9]

Therefore, the ruling in People v. Hallman, 68 N.Y. 2d 202 (1986) obliges this Court to deny the motion to dismiss the informations on that ground.

d. Public Expsoure of the Female Breast, but not the Male Breast, is Reasonably Classified as Nudity of a Private & Intimate Part of the Body

This Court now comes to the most ardently contested issue in this case: i.e. that the law barring public exposure of women's breasts, but not men's breasts, based upon a finding that women's breasts, but not men's, constitute a private or intimate part of the human body, lacks a rational basis, and for that reason, its sexual classification is constitutionally void.

---

[9]The Court acknowledges here that, notwithstanding the disclaimers in the opinion of the Court of Appeals in the Hallman case, the purpose of the indecent exposure law is not only to provide general public access to recreational areas, but it is also to set a standard of morally decent behavior. It is because public nudity is not morally decent and acceptable that families stayed away from Jacob Riis Beach. Re-establishment of the moral standards on public nudity, in effect, returned the beach to the general public, and specifically, to family use. Therefore, there is no question that the indecent exposure laws enact moral judgments which serve to benefit the common good. Law and morality are not so separate when the public order must be served. Moreover, it is clear that under the New York Constitution, an advocate of public nudism cannot be a law unto himself.

In this regard, the testimony of the defendants' expert witness, Dr. Rita Freedman, Ph.D. of Scarsdale, New York, is most illuminating. Dr. Freedman is a specialist in developmental psychology, concentrating on gender development. She distinguishes between primary and secondary sexual characteristics within the human body. But what is more, she noted the differences among those characteristics depending on whether the classification is physiological, or psychological. The physiological characteristics are those which permit and facilitate reproduction of the human species. The psychological characteristics are those which operate erotically to stimulate sexual activity.

Physiologically, the primary sexual organs do not include the breasts of either sex. Psychologically and erotically, however, the expert admitted that, in our current society, the female breast is, indeed, a primary sexual characteristic.

Although Dr. Freedman explained, at length, that these erotic properties of the female breast are essentially cultural, as distinguished from natural, and although she elaborated on the oscillation among cultures, from body part to body part, as to which part(s) possessed such properties, she nonetheless admitted that, in the United States today, now, and for the foreseeable future, the female breast possesses the erotic properties of a primary sexual organ, and the male breast does not.

The defendants argue that Puritanical laws (such as Penal Law 245.01), requiring that the female breast be covered, have, in fact, caused the female breast to become invested with this erotic power, and that public exposure of female breasts

would quickly remove this erotic characteristic. The argument is not persuasive. As the Court stated in Eckl v. Davis, 51 Cal. App. 3rd 831 (1975):

> Nature, not the legislative body, created the distinction between that portion of a woman's body, and that portion of a man's torso. Unlike the situation with respect to men, nudity in the case of women is commonly understood to include the uncovering of the breasts." 51 Cal. App. 3rd at pp. 847-848.

Social organization is the mother of cultural mores. Social and cultural development antedate the foundation of political institutions. The acclivity of human progress tends towards rational order. Laws emerge at the upper levels of the graph of human experience. And to be successful, those laws must reflect what has gone before, and what has already bound the community together.

This Court finds that, understood from this perspective, Penal Law §245.01 rests upon a rational basis, and reflects the current moral standards of New York, and creates a constitutionally valid classification between male and female nudity.

ORDER

The defendants shall appear, in person, at 9:30 a.m. before this Court on Wednesday, December 13, 1989, for sentencing.

Dated: December 11, 1989

Hon. John Manning Regan
Rochester City Court Judge